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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 608

■

E. V. DAVIS, *Petitioner*

v.

THE STATE OF ARIZONA, *Respondent*

■

Petition for Writ of Certiorari to the Superior Court of Maricopa County Arizona

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Petition for Writ of Certiorari to the Superior Court of Maricopa County Arizona

TO THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner presents this his petition for writ of certiorari and shows unto the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. *Preliminary Statement.*

The Superior Court, a trial court, is the highest court in the State of Arizona in which a decision can be had in this controversy.

Without consent of petitioner the Superior Court suspended passing of sentence upon appellant. (R. 14-15, 133-

135) Being aggrieved by the verdict finding him guilty, petitioner duly appealed from the verdict and order suspending sentence, to the Arizona Supreme Court. (R. 10-13) Upon motion duly made by the State, the Supreme Court of Arizona dismissed the appeal because taken prematurely in that petitioner had not been sentenced. (R. 214, 218-221) This order was rendered September 16, 1942. (R. 214) Thereafter on October 10, 1942, the Superior Court revoked suspension of sentence and rendered and entered a judgment upon the verdict and assessed a fine of $100, and petitioner was remanded to the custody of the Sheriff of Maricopa County until such fine was paid. (R. 216-217, 224) Thereupon petitioner duly appealed to the Supreme Court of Arizona from said judgment of October 10, 1942. (R. 222-223, 224-225) Thereupon the State moved to dismiss the appeal again because under the law of Arizona it is held that there can be no appeal from a judgment later rendered where sentence was originally suspended. *State* v. *Brooks,* 78 P. 2d 498. (R. 225-228) This motion was opposed by proper pleadings showing that petitioner did not accept or agree to accept any benefits of a suspended sentence, but sentence was suspended without the consent of petitioner. (R. 229-232) The Arizona Supreme Court dismissed the appeal on the authority of *State* v. *Brooks,* supra. R. 232-233.

The refusal of the Arizona Supreme Court to exercise its power to review the judgment makes the Superior Court the highest court in the state in which a decision can be had in this particular controversy. *Grovey* v. *Townsend,* 295 U. S. 45, 47; *Western Union Tel. Co.* v. *Hughes,* 203 U. S. 505; *Kentucky* v. *Powers,* 201 U. S. 1, 37; *American Ry. Ex. Co.* v. *Levee,* 263 U. S. 19, 20.

2. *Statutory Provision Sustaining Jurisdiction.*

Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] sustains jurisdiction of this Court.

3. *Validity of Arizona Legislation Drawn in Question.*
The legislation here drawn in question is—

(a) A state statute known as Section 54-808, Arizona Code Annotated 1939, providing as follows:

> "The school authorities of every public school shall purchase a United States flag, flagstaff, and appurtenances, and display such flag upon or near the public school building during school hours, and at such other times as they direct. The state superintendent of public instruction shall prepare for use in the public schools a program, providing for a salute to the flag and other patriotic exercises, as meet the requirements of the different grades. He shall also make special provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day, and Flag day, and other legal holidays of like character." R. 118.

A regulation of the state superintendent of public instruction was duly passed and enforced, as required by the statute, in the school attended by petitioner's children.

(b) A state statute known as Section 43-1008 of the Arizona Code Annotated 1939, among other things reading as follows, to wit:

> "Contributing to delinquency and dependence—Penalty—Procedure. Any person who shall by any act cause, encourage or contribute to the dependency or delinquency of a child, as these terms with reference to children are defined by the preceding section, or who shall for any cause be responsible therefor, shall be guilty of a misdemeanor, and upon a trial and conviction thereof, shall be punished by a fine not to exceed three hundred and fifty dollars ($350.00) or by imprisonment in the county jail for a period not exceeding one (1) year, or by both such fine and imprisonment." R. 205.

(c) Section 43-1007 of the Arizona Code Annotated 1939, which provides, among other things, as follows:

> "(a) The words 'dependent person' shall mean any person under the age of eighteen (18) years;
>
> "17. Who from any cause is in danger of growing up to lead an idle, dissolute or immoral life.
>
> "(c) The term 'delinquency' shall mean an act which tends to debase or injure the morals, health or welfare of a child." R. 116-118, 205.

4. *Date of Judgment and Orders to be Reviewed.*

The judgment of the Superior Court was rendered and entered on October 10, 1942. (R. 216-217, 224) Within the time required by law, petitioner duly appealed to the Supreme Court of Arizona. (R. 222-225) The appeal was dismissed November 27, 1942. (R. 232-233) The time for filing petition for writ of certiorari begins to run from November 27, 1942, and expires February 27, 1943. This petition is filed within that time.

5. *Time and Manner in which Questions Raised Below.*

At the close of the State's evidence, petitioner duly filed and urged his motion for a directed verdict. (R. 129-130) In the motion among other grounds it was contended

> "That the statute as construed and applied is unconstitutional and that upon the grounds that it violates the first and fourteenth amendments to the United States Constitution in that it deprives the defendant of the free exercise of religion, and, further, that it deprives the defendants of their liberty and property without due process of law, in contravention of the fifth amendment to the Constitution of the United States. . . . Now then, under the first ground, the unconstitutionality of the statute, we cite the first, and fourteenth and fifth amendments to the Constitution of the United States." R. 74-75.

The motion was denied and exception allowed. (R. 114, 131, 75) At the close of all the evidence and testimony, petitioner duly filed his motion for directed verdict (R. 113), which urged the identical grounds contained in the first motion. (R. 113) This motion was denied and exception allowed. R. 131-132.

6. *Opinions of the Courts Below.*

There was no opinion by the Superior Court. There were no opinions written by the Supreme Court of Arizona on the two orders dismissing the two appeals taken by petitioner.

An opinion was written by the Supreme Court of Arizona on questions certified to it by the judge of the Superior Court when petitioner filed his motion to quash the original information. The opinion held that the statutes were applicable to petitioner's conduct and that they did not deprive petitioner of any constitutional right. This opinion is styled *State* v. *Davis,* and is reported in 120 P. 2d 808. It appears in the record. R. 203-213.

7. *Statement of Facts.*

Petitioner and his wife are Jehovah's witnesses and had been for a long period of time prior to November 1941. They have four children. They considered it necessary to teach and bring up their children in the nurture and admonition of the Lord as He has commanded in the Bible. For four years, daily, in their home with their children they discussed the Bible and what it means. Every morning at home a daily text was read from the Bible and a discussion had thereon. On Sunday and Wednesday nights the children were required to attend Bible studies using the *Children* book and the *Watchtower* magazine. They and their children honestly believed that Exodus 20:2-5 as understood by them prohibited them from saluting any flag, including the United States flag, and from participating in any flag-salute ceremonial. The children had been

taught this by their parents and had studied the booklet *Loyalty* (R. 139-167) and the booklet entitled *God and the State* (R. 169-201), both containing a more detailed analysis of the good faith and Bible reasons of Jehovah's witnesses for their refusal to salute the flag. Petitioner and his children believed and adopted the contents of these two booklets as further statement of their grounds for refusing to participate in any flag-salute ceremony. Petitioner has never told, instructed, forced or commanded his children not to salute the American flag, but their action in that regard is left entirely up to their individual conscience. Petitioner taught his children the commandments of Jehovah God, which forbade them from saluting the flag. Petitioner believed that it was his responsibility to teach his children the said commandments of Almighty God in harmony with Proverbs 22:6; Ephesians 6:1-6; Exodus 20:3-5; and Deuteronomy 6:7. The children were frankly advised that the Bible prohibited bowing down or saluting the flag of the United States or any other flag. Petitioner believed that his covenant to obey Jehovah God required him thus to teach his children the commandments of Jehovah and that if he failed so to do that he would be everlastingly destroyed by Almighty God. R. 75-112.

Petitioner's children, Thelma Davis, age eight, and Wayne Davis, age six, during the school terms of 1939 and 1940 were enrolled at the Agua Fria School known as District No. 22. At this school there was duly enforced a flag-salute ceremony pursuant to the regulation therefor duly promulgated by the State Superintendent of Public Instruction. (R. 21-27, 29-40) Petitioner's children refused to salute the American flag. They requested to be excused and were excused at first. Later they were expelled. Petitioner returned the children to school and they were sent back home each day. (R. 29-40) These children were enrolled again at the opening of the same school for the 1941-1942 term. They again refused to salute the flag or otherwise participate in the ceremony. For this they were ex-

pelled after attending school only seven days of the term. (R. 41-45) The children stated that they refused to salute because to participate in the ceremony was contrary to their belief as to the commandments of Almighty God. They were otherwise excellent students and were not offensive to anyone. R. 45-49, 53-73.

When the children were expelled the petitioner was financially unable to provide them with private schooling or to give them education in conformity with the compulsory education laws. Petitioner repeatedly returned the children to school until the school principal wrote a note to him saying there was no need for them to be returned to school any more as they would not be admitted until they agreed to salute the flag. R. 102-112, 75-84.

8. *Information and History of Proceedings.*

By amended information petitioner was charged, among other things, as follows:

> "The said E. V. Davis and Naomi Davis on or about the 20th day of September, 1941, and before the filing of this information at and in the County of Maricopa, State of Arizona, did then and there, by their wrongful and improper acts and conduct, willfully and unlawfully encourage and contribute to the delinquency of Thelma Davis and Wayne Davis, who were then and there children under the age of eighteen years, to wit; of the age of eleven years and nine years respectively, which said wrongful and improper acts on the part of the defendants were as follows, to-wit:
>
> "That the said defendants being then and there adult persons and being the natural parents of the said children, and being members of a religious sect known as Jehovah's witnesses, and the said Thelma Davis and Wayne Davis being then and there children, they, the said defendants did then and there teach, instruct, direct and command the said Thelma Davis and Wayne Davis not to and to refuse to pledge *al-*

legiance to and salute the flag of the United States of America at all times and while they, the said Thelma Davis and Wayne Davis were attending the public schools of the State of Arizona, for the reason that to salute the flag of the United States of America was contrary to the religious belief of the said sect known as Jehovah's witnesses and the religious beliefs of them, the said defendants, and of the said Thelma Davis and Wayne Davis; and they the said defendants then and there well knowing that under and by virtue of the laws of the State of Arizona, and under and by virtue of the rules and regulations prescribed by the Superintendent of Public Instruction of the State of Arizona and the school authorities of the public schools of the Agua Fria School District, No. 22, Maricopa County, Arizona, wherein the said Thelma Davis and Wayne Davis attend public school, provided and prescribed a program as a part of the course of instruction in said schools, the said Thelma Davis and the Wayne Davis and all other pupils attending school therein were required to salute the said flag of the United States of America; and the said defendants then and there well knowing that by the refusal of the said Thelma Davis and the said Wayne Davis to salute the said flag of the United States of America they, the said Thelma Davis and Wayne Davis would thereupon be lawfully barred and expelled from attendance in the said public school provided for the education of the said children of the said Agua Fria School District No. 22, and the said defendants further then and there well knowing that upon the said Thelma Davis and the said Wayne Davis being barred and expelled from attendance in the said public school that the said Thelma Davis and the said Wayne Davis could not in fact in any other manner obtain educational instruction, either at public or private schools as provided by the laws of the State of Arizona.

"That the said minor children acted in obedience to the said instruction of the said defendants to refuse to salute the said flag of the United States, and that the said minor children were on that account and therefor barred and expelled from attendance in the said public schools, and that said minor children cannot otherwise obtain educational instruction as provided by the laws of the State of Arizona;

"And the said County Attorney does further charge and allege that in the manner and form aforesaid the said defendants did then and there by their said aforesaid acts tend to injure the morals and welfare of the said Thelma Davis and the said Wayne Davis; contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the State of Arizona." R. 1-3.

The case was tried and evidence heard on April 22 and 23, 1942. (R. 1-122, 129-131) The court instructed the jury as to the law. (R. 114-122) Thereupon the jury returned a verdict finding petitioner guilty. (R. 5, 132) Petitioner duly filed a motion for new trial. (R. 6-9) It was overruled. (R. 133) Passing of sentence was deferred for one year subject to petitioner's refraining and desisting from, in any manner or under any circumstances, coercing, compelling or commanding the children to desist from saluting the flag of the United States of America or participation in any of the patriotic ceremonies of the public schools and that the children be sent to the public schools and instructed to obey all rules and regulations. (R. 14-15, 133-135) From the verdict and order petitioner duly perfected appeal to the Supreme Court. (R. 10-13, 136) When the first appeal was dismissed because premature the trial judge rendered a judgment upon the verdict. (R. 216-217, 224) Subsequent appeal from this judgment was again dismissed November 27, 1942. R. 232-233.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there are now presented to this Court for review, substantial Federal questions as follows:

(1) Does the construction and application of Section 54-808 of the Arizona Code Annotated, providing for flag salute ceremony in the schools so as to permit the expulsion of petitioner's children from school for their refusal to participate therein because of conscience' sake, abridge and deny petitioner's rights of freedom of conscience and worship of Almighty God and the right to have his children attend the public schools, contrary to the First and Fourteenth Amendments to the United States Constitution?

(2) Does the construction and application of Sections 43-1007, 43-1008 and 43-1009 of the Arizona Code Annotated to acts and conduct of petitioner abridge and deny his right to bring up his children and instruct them as to the commandments of Jehovah God, and as well abridge and deny him his rights of freedom of speech and of worship of Almighty God contrary to the First and Fourteenth Amendments to the United States Constitution?

C

Reasons Relied on for Grant of Writ

When a question concerning the right of conscience molded by Jehovah God secured against abridgment by the Bill of Rights is presented against the claims of the state the most extreme scrutiny is required on the part of the court. Such is the perennial question presented here.

The main reason relied upon as ground for allowance of the writ is that the *compulsory flag salute* question is not settled. Four of seven present members of this court who shared in the decision rendered in *Minersville* v. *Gobitis,* 310 U. S. 586, are now of the opinion that that case was wrongly decided and that the position there taken by respondents should have been accommodated by this court. In *Jones* v. *Opelika,* 316 U. S. 584, 623-624, Justices Black, Douglas and Murphy publicly announced their stand to be like the view expressed by Justice Stone's dissent in the *Gobitis* case. What Justice Jackson thinks about the question is not known. This applies also to any man to be appointed to fill the present vacancy on the court. A reconsideration of the issue is therefore necessary in order that the view of the court as it is presently constituted may be expressed. See the opinion of Judge Parker in *West Virginia State Board of Education, et al.,* appellants, v. *Barnette,* No. 591, October Term 1942, pending in this Court.

It is our thought that upon another argument of this question before this court every member of the court may be persuaded to adopt a view similar to that expressed by Mr. Justice Stone. The question is therefore deserving of reargument and reconsideration by the entire court.

The decision in the *Gobitis* case has by no means settled the law with respect to the issue; but on the contrary more conflicting opinions have been rendered on the matter than existed before the decision was filed in that case. See *State* v. *Smith,* 155 Kans. 588, 127 P. 2d 518, holding that the

regulation as applied to Jehovah's witnesses in Kansas was unconstitutional and that the Bill of Rights of Kansas was not a bunch of glittering generalities and was not as weak as the Federal Constitution as construed by this court in the *Gobitis* case. In *Barnette* v. *West Virginia State Board,* 47 F. Supp. 251, the United States District Court announced that the *Gobitis* decision had been seriously impaired as precedent and practically overruled by virtue of the special dissent written by Mr. Justice Black in *Jones* v. *Opelika,* supra. State appellate courts have consistently refused to permit the conviction of parents to stand under statutes similar to that involved in this case where the reason for the children's expulsion from school was because of their refusal to salute the flag. See *In re Latrecchia,* 128 N. J. L. 472, 26 A. 2d 881, *People* v. *Chiafreddo,* Ill. Supreme Ct., 44 N. E. 2d 888, *State* v. *Smith,* supra, thus further adding to the confused state of the law on this subject. See *People* v. *Sandstrom,* 279 N. Y. 523, 18 N. E. 2d 840.

The majority holding in the *Gobitis* case has been further impaired by holdings of the courts to the effect that expulsion from school of children of Jehovah's witnesses for refusal to salute the flag is not sufficient reason to support or justify a finding that the children were "delinquents". See *In re Lefebvre,* ... N. H. ..., 20 A. 2d 185; *In re Jones,* 175 Misc. 451, 24 N. Y. S. 2d 10, and *In re Reed,* 262 App. Div. 814, 28 N. Y. S. 2d 92.

The holding in the case at bar is directly in conflict with the above mentioned cases.

By some it was, no doubt, thought that the *Gobitis* decision would be a contribution to national unity; but on the contrary it has had the opposite effect. In the history of the nation there has not been a decision by the court on a more burning issue that has so sharply divided the people. The decision has pushed otherwise tolerant and liberal-minded American officials to take further steps of suppression against the most persecuted minority ever known in the history of the United States. It has been misconstrued

by pseudopatriots and has misguided many persons to do great violence and wholesale violation of the law against Jehovah's witnesses. In the two years following the *Gobitis* decision, it can be authoritatively stated that the files of the Department of Justice reflect an uninterrupted record of violence and wholesale riots, mobs and other wickedness against Jehovah's witnesses. In every instance and without exception the popular view that Jehovah's witnesses do not have legal right to refuse to salute the flag is the excuse and argument used to start the violence. In every instance that excuse has been assigned by so-called peace officers for refusing to do their duty to give protection to Jehovah's witnesses, and in some instances to commit acts of violence with the mobs against such helpless and innocent ones. In many states the flag has been used in a manner bordering on immorality by mobs which have therewith baited Jehovah's witnesses. In addition to the eighteen states which prior to 1939 had seen fit to expel children of Jehovah's witnesses, since the *Gobitis* decision it has been used as an excuse to expel them in all others of the forty-eight states.

This ugly picture of the two years following the *Gobitis* decision is an eloquent argument in support of the minority contention of Mr. Justice Stone, and of the like position taken recently by Justices Murphy, Douglas and Black. The placing of symbolic exercises of comparatively insignificant constructive value and benefit on a higher plane than freedom of conscience has made the symbol of a government of a free people an instrument of oppression of a Godly, law-abiding minority comprising courageous, home-loving, industrious, upright citizens. It has degraded the flag in such instances to the low, oppressive level of the Nazi swastika. The flag has been besmirched and degraded by its misuse to deny the very freedoms it is intended to represent. The free exercise of these freedoms best engenders a healthy "cohesive" respect for national institutions about which Mr. Justice Frankfurter had much to say for the majority in the *Gobitis* case. In short, public

health, safety, morals and welfare have not been helped or improved or strengthened by the *Gobitis* decision. Indeed, the nation-wide unhappy results above mentioned have been quite to the contrary.

As American citizens, abandoned and forced to face the unhappy consequences of the *Gobitis* decision, now a judicial blunder, Jehovah's witnesses have valiantly fought and are now fighting the terrific onslaught of persecution that has followed it. Since the Federal Constitution as a barrier was taken away in that decision they were compelled to fight in the name and strength of the Almighty God Jehovah and by His grace are here to present to this court the facts in this case. The consequences to which we have been taken in this case are indisputable evidence that the new and basic theory announced by Justice Frankfurter in the *Gobitis* case does not and cannot work in a democracy. The theory referred to is stated by the Justice thus: "Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. . . . Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."

When this court refused to make itself "the school board for the country" by protecting the constitutional rights of Jehovah's witnesses and thus shifted the great burden and responsibility to the school boards Jehovah's witnesses went along with this decision at every school term following June 3, 1940. When wholesale expulsions began throughout the nation they immediately appealed and have since continued to appeal to the local school boards to have the "foolish legislation" provide an exemption for those who

had conscientious objection to the flag salute. The answer to this plea in every one of the thousands of cases was that the Supreme Court of the United States has ruled that Jehovah's witnesses must salute the flag in order to enjoy the benefit of education. This nation-wide fight by Jehovah's witnesses during the last two years in the "forum of public opinion" has not resulted in "abandonment of foolish legislation", has not been "a training in liberty" and has not served "to vindicate the self-confidence of a free people."

This terrible experiment under the above doctrine announced in the majority opinion written in the *Gobitis* case is one of the soundest reasons that can be advanced in support of the granting of the writ and establishes the required "special and important reasons" for exercising judicial discretion in granting the relief sought.

In spite of the noble sounding words of Justice Frankfurter about "abandonment of foolish legislation" it should be noted that the only relief given against the compulsory regulation has been by the brave judges of the courts and not by legislative or quasi-legislative bodies.

Another reason why this court should grant the writ is that the holding of the court below is in direct conflict with *Meyer* v. *Nebraska,* 262 U. S. 390, *Stromberg* v. *California,* 283 U. S. 359, and *Pierce* v. *Society of Sisters,* 268 U. S. 510. This makes it plain that the state court has decided a federal question of substance in a way which is not in accord with applicable decisions of this court. The holding of this court in the *Gobitis* case does not affect the conflict between this case and the two last above cited. It can be assumed for the purpose of argument only that the *Gobitis* case was decided correctly and yet such decision does not warrant the ends to which the court below stepped in the case at bar. The state did not stop at expelling the children but went further and misapplied and stretched the state criminal laws out of shape to reach unconstitutional limits. Petitioner's children had been expelled from school before this proceeding was brought. Their conscien-

tious scruples could no longer interfere with the school program; their refusal to join in the flag ceremony could no longer tend to weaken the desired effect upon other children. This being the case, what purpose within the competency of the state is to be served by declaring this father "guilty" and inflicting severe punishment upon him? Will it engender and maintain patriotism in him or his children? Will the threat of future prosecution tend to engender and maintain patriotism in other children? Will it add to national cohesion and national unity? Will it be "a training in liberty"? Will it serve "to vindicate the self-confidence of a free people"? Down through the corridors of long months of bloody persecution comes in thundering tones the answer, emphatically, NO!

Saluting the flag at most has only indirect possible effect upon the interests which can be protected by the state. It is manifestly foolish legislation when compared with the more urgent and needed legislation passed by Congress of the United States known as the Selective Training and Service Act. It is noticed that the Congress of 1940 saw fit to accommodate the conscience of individuals by volunteering, contributing and providing exemption from military service for persons opposed thereto on reasonable grounds. If this does not endanger the safety of the nation, why cannot the Supreme Court of the United States enforce the exemption provided in the Bill of Rights to accommodate little children who conscientiously object to participating in the flag-salute ceremony?

The compulsory flag salute regulation provided for by Section 54-808 of the Arizona Code is an act which set in motion the chain of events transpiring in this case which resulted in the punishment and injury suffered by the petitioner. Therefore the validity of this regulation is the basic question to be determined in this appeal. However, if it be assumed that the regulation is valid there still remains for determination by this court the question of whether or not the delinquency laws, Sections 43-1007 et seq., have

been construed and applied in a manner so as to abridge the constitutional rights of petitioner contrary to the First and Fourteenth Amendments to the United States Constitution. The first question is now unsettled and undetermined. The second question has been decided by the court below in a manner which directly conflicts with prior decisions of this court, the most significant of which is the case of *Meyer* v. *Nebraska,* supra.

It is submitted that this case is one calling for exercise of this Court's supervisory powers under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] and Rule 38, paragraph 5 (a), of the Rules of this Court.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Superior Court of Maricopa County, Arizona, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case and that the decree and judgment of the Superior Court dated October 10, 1942, sentencing petitioner to pay a fine and upon default of payment thereof to be committed to jail, be here set aside and reversed; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the extraordinary circumstances.

E. V. DAVIS, *Petitioner*

By HAYDEN C. COVINGTON

His Counsel of Record

SUPPORTING BRIEF

Assignments of Error

The petitioner assigns the following errors in the record and proceedings of said cause:

The Superior Court committed fundamental and reversible error in rendering and entering the judgment and sentence upon the verdict because

(1) The compulsory flag salute regulation provided for by Section 54-808 of the Arizona Code when construed and applied to the facts and circumstances of this case abridges petitioner's rights to send his children to public schools and to instruct and direct the spiritual education of his children, his rights of freedom of speech, conscience and of worship of Almighty God, and deprives him of his property without due process and equal protection of law, all contrary to the First and Fourteenth Amendments to the United States Constitution.

(2) Sections 43-1007 et seq., of the Arizona Code, as construed and applied to the conduct of petitioner, deprives him of his liberty of speech, freedoms of conscience and of worship of Almighty God, his rights to instruct and direct the spiritual education of his children, and his liberty without due process and equal protection of law, all contrary to the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

In recent years much has been said concerning the attitude of Jehovah's witnesses toward the flag. This has been greatly misrepresented through vicious influence upon public opinion by enemies of Jehovah's witnesses. Such slander and libel have caused them to suffer much injury and led many public officials and judges to fall short of performing their duty, to their everlasting disgrace.

Jehovah's witnesses are not against the flag nor the things for which it stands. They highly respect the flag and the things it symbolizes. They show this respect by obeying all the laws of the land that are constitutional and which do not conflict with the laws of Almighty God. They come to this Court for protection because they believe in liberty for all and fight from the lowest courts throughout the nation all the way to this Court because they respect the Constitution and the valid laws of the land. They have been ever vigilant to resist and fight on the home front the enemies of the Constitution and to defend the things it guarantees to all. Jehovah's witnesses desire to see "Old Glory" wave until all peoples and nations are brought together under the Theocracy or one government of righteousness, following Jehovah's battle at Armageddon, which Government is God's kingdom, The Theocracy, for the full control of which all true followers of Jesus Christ are taught by Him to pray.—Matthew 6:9-13.

Jehovah's witnesses advocate liberty and justice for all regardless of creed or color and do not infringe upon the rights of the state or any individual by their beliefs or practices.

Petitioner is in a covenant to do the will of Jehovah God. This includes the duty of teaching his children their responsibilities to Almighty God. His children also are in an agreement to follow in the footsteps of Christ Jesus and obey the commandments of Almighty God. One of such commands, which cannot be disobeyed by the petitioner and

his children, is that recorded in Exodus 20:3-6. This command very plainly forbids Jehovah's witnesses to salute any flag of any nation, including the United States flag. This refusal is not an act of disrespect nor is it based on any "crochety" belief. The refusal to salute is not an indication of disloyalty or criminal opposition to the government. The belief and the refusal to salute is a sincere and genuine effort to remain obedient to Almighty God. Petitioner and his children believe that if they salute or participate in the ceremony in violation of such plain command they will be everlastingly destroyed by the only Giver of life.

In this circumstance of a conflict between the commands of God and the State there is only one course left open for the true servant of God to take. That course is dictated by Jehovah God through His Word the Bible, which contains many cases in point where similar conflicts were confronted and dealt with in times past by Jehovah's faithful servants who took the same position as that taken by petitioner and children. See Esther, chapters 3, 4, 5; Daniel, chapters 3 and 6; Jeremiah, chapter 26. This course of action dictated by Jehovah God for the petitioner and his children, Jehovah's witnesses, to follow is stated by the apostle thus: "We ought to obey God rather than men."—Acts 5:29.

The position of Jehovah's witnesses in refusing to salute the flag because of these God-given commandments is not unreasonable. The abhorrence of the Israelites to giving religious obeisance to flags, standards, symbols and emblems is instanced in the days of the Assyrians' attack on Jerusalem and also in the days of Pontius Pilate, the Roman resident governor of Judea who, fearful of majority rule, delivered over Jesus Christ to be nailed to the tree at Calvary and "WASHED HIS HANDS" of responsibility for enforcing the law. In profane history a record has been made of the stand of the Jews against flag salute and symbols. See Josephus, *Antiquities,* Book xviii, 3, 12; *Wars of the Jews,* Book ii, 9, 2-4; *The International Bible Dictionary;* McClintock and Strong's Cyclopedia, Vol. VIII, p. 200; Barclay, *Apology*

for the True Christian Divinity, Proposition xv, Sect. 6.

One need explore but a short space of time back into modern history to find similar examples of conduct of righteous and conscientious men who placed God above the State and refused to salute or ascribe salvation to the state. Every child and student of American history knows of the intense persecution and suffering endured by William Penn who firmly refused to salute the king of England by removing his hat in the presence of the monarch—the popular custom and current salute of that day. He founded Pennsylvania as a haven for persecuted Quakers who fled from bitter hostility shown against them in England to the new commonwealth where they found refuge in a "land of liberty".

Men who had been persecuted in England and continental Europe fled from such lands of oppression and came here in a constant stream while they hewed out of the wild forests the beginning of this nation.

The founding fathers who wrote the Bill of Rights wisely wrote in plain but general terms the injunctions contained in the First Amendment so as to guarantee to their posterity freedom of conscience and protect them against the terrible persecutions from which they and their forefathers fled. There can be no doubt that allowances were intended to be made for men with "crochety" beliefs, such as William Penn and his brethren, who would not salute the state or any image thereof, animate or inanimate. There can be no doubt that the writers of the Constitution did intend that this guarantee of the right of supremacy of conscience in proper fields should not be impaired by judicial amendment, but should be enforced by judicial decree.

It is contended that to teach the children that the commandments of Almighty God forbid the salute of any flag is a doctrine fraught with dangers and which tends to debase and injure the health and welfare of the children. There is no evidence whatsoever of a clear and present danger that the morals of the children or their health would

be debased or injured as a result of such teachings. There is no evidence of clear and present danger that the conduct of the children interfered with the decorum, conduct or morale of the school where they attended or impaired the control of the teachers over any of the children. The undisputed evidence shows that the Davis children were good, obedient and intelligent students. Their conduct was in harmony with all rules except that with respect to the salute of the flag.

There is no showing or contention that the petitioner coerced, commanded or forced his children either directly or indirectly to refuse to salute the flag. The admitted evidence establishes only that he taught them the Bible and let them choose their own course of action. He told them the Bible forbade the saluting of a flag by persons in a covenant with God such as Jehovah's witnesses. If they believed God's Word, they refused; if not, they were free to salute. If this be compulsion then Jehovah God *alone* is responsible for the children's conduct and not the petitioner.

The statute providing for the flag-salute regulation has been misconstrued in such a manner as to abridge and deny petitioner's and his children's inalienable, priceless rights of freedom of conscience, of speech, and of worship of Almighty God contrary to the Federal Constitution. This contention is not in accord with the holding in the *Gobitis* case. The *Gobitis* decision is wrong. We now show why it is wrong.

The basic fallacy in the *Gobitis* decision is that this Court abdicated its duties with respect to protection of the sacred rights of conscience of the individual and shifted such responsibilities to the school board, permitting such board's decisions to be supreme. In justification of that step this Court announced the *new rule* that the citizen, regardless of how unpopular, oppressed and persecuted, must trust in the majority popular will to correct "foolish legislation" which admittedly violates the constitutional

liberties of the people declared in the Bill of Rights. There this Court held that its only duty is to keep open the process of correcting such legislation by appeal to the popular open forum, the legislature, etc. This Court said that were its decision on this question given *in favor* of Jehovah's witnesses that would make it the *school board* for the nation. In effect the Court held that safeguarding "freedom of conscience" is entirely a local problem with which this Court is not concerned.

The new theory of requiring appeal through democratic processes to the *people* (i. e., majority rule or *mob* rule), as the only way to correct "silly" legislation violating the Bill of Rights, is judicial repeal of the Constitution itself. This returns the small minorities to the same condition they were in prior to the American Revolution. This is a favorite "judicial" theory of the totalitarian governments and their despots. If the citizen's exercise of his fundamental rights depends on popular will, approval or consent of *the majority,* then such rights will change with the whim of every majority in power and the Constitution be not worth the paper it is written on.

It is a well known fact that minorities, especially when unpopular, have just about as little chance for repeal of *silly legislation* before the open forum of public opinion and some legislative bodies as a refrigerator salesman has to find buyers of his ice boxes in the land of the Eskimo. To offer minorities this sort of protection is like handing a straw to a drowning man to rescue himself!

The error of the suggestion to appeal to the *popular forum* is proved by the fact that thousands upon thousands of Jehovah's witnesses have been refused a fair hearing on their petitions to have the regulation amended so as to permit their children to attend school and be excused from ceremonies of this character. All of said petitions have been denied annually under the 'authority' of the *Gobitis* decision, since which case children have been denied educa-

tion and parents their constitutional rights in all 48 states of the *Union*.

As a further illustration of how ineffective the suggestion of appeal by minorities to *popular rule* for relief, attention is called to the Negro situation in the *South* under the Jim Crow law and other customs prevailing there. In such situations, as above, where prejudice against small minorities prevents appeal to political processes to correct the evil, the minorities are thus left to the arbitrary will of the majority. This Court in such circumstances as these has the duty to scrutinize legislation which violates the rights of conscience regardless of whether or not the Court will become the *school board* for the nation. It is suggested that Jehovah's witnesses' experience with the school boards of the nation prove that such boards need a short lesson in democracy and "training in liberty" by being ordered to reinstate children of Jehovah's witnesses. Such would teach such stiff boards how to desist from searing the young conscience by applying the "hot poker" of oppression to little innocent liberty-loving children who have sincere and valid objections to the compulsory flag salute.

It is respectfully urged that the decision in the *Gobitis* case made the school boards the *Supreme Court* of the nation as far as the compulsory flag-salute controversy is concerned. The result is that the Court has allowed every individual, principal, teacher and school board member having anything to do with the controversy to become a little czar unto himself, and in every case deciding what seems right in the particular circumstances. In thus leaving this important national problem up to the school boards, to determine locally the question of freedom of conscience, chaos and confusion have resulted. Such a rule allows national disunity and works to the destruction of cohesion because it permits each community to establish a different rule which can easily change and vary with the rising of every sun. Thus the rule announced in the *Gobitis* case

subordinates the Constitution to the rules of the school boards. Such nullifies the Constitution.

The declared guaranties of freedom of conscience, of worship, of speech and of press are statements by the people of this nation speaking directly to those who govern, and fixing the limitation of state and national governments and their subdivisions and subordinates, including school boards, when there is a conflict. Those express guaranties cannot be made to yield to the weaker, and at most indirect and oftentimes unauthorized, expression of the people through the legislature or school boards.

While it may be argued that the general rights of property protected and secured under the 14th Amendment to the Constitution may be required to yield to more specific statements of the legislature acting in a field of proper power, it cannot be said that any such requirement exists with respect to the civil rights of personal liberty specifically guaranteed against all sorts of abridgments expressed in the 1st Amendment. When there is a collision between the stronger and express provisions of the first amendment with the stated policy of the legislature the decree of the legislature must yield unless such law or statute deals with an abuse of the rights guaranteed under the 1st amendment which is properly within the police power. It is admitted that the statutes drawn in question do not deal with an abuse of those rights. Before there can be an encroachment of these rights by laws enacted under the police power there must appear a clear and present danger that some interest which the state is authorized to protect from such abuse is immediately to be invaded. There is no such situation presented here.

The holding in the *Gobitis* case conflicts directly with the prior decision of this Court in *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 where it is said:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation ap-

pears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California 283 U. S. 359, 369-370; Lovell v. Griffin 303 U. S. 444, 452.

"It is unnecessary to . . . enquire . . . whether prejudice against discrete and insular minorities may be special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

The words of Mr. Justice Roberts in *Schneider* v. *State,* 308 U. S. 147, are appropriate on the issues here presented, to wit:

"Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In the *Gobitis* case it is said that the judgment of the legislature authorizing action of the school boards in promulgating the flag-salute regulation could not be inquired into or questioned *by the courts.* The Court does not discuss the limits of the police power of the state, does not discuss the circumstances when freedom of worship and conscience can be invaded, and does not employ the "clear and present danger" test, which is necessary. Though the legislature may decide in the first place what is necessary its decision is not final when liberty of conscience, of worship of Almighty God, of speech and of the person is denied. In the end this Court must decide whether there is justification for the abridgment and whether there is a *clear and present*

danger which must be found to exist. The rule was well expressed in *Herndon* v. *Lowry,* 301 U. S. 242, when this court said:

> "The power of a state to abridge freedom of *worship, conscience,* speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." [Italicized words added.]

The doctrine of supremacy of the legislature has been considered and condemned by one of the most eminent advocates and statesmen in history of these United States. Mr. Webster in the case of *Dartmouth College* v. *Woodward* (4 Wheat. 518, 581-582) said: "Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country." See *Webster's Works.*

This question has also been dealt with in *older days* by a well known New York judge in the case of *Taylor* v. *Porter,* 4 Hill (N. Y.) 140, 143, where it is said: "Statute law is in the highest sense the law of the land; and the legislative department, created for the very purpose of declaring from time to time what shall be the law, possesses ample powers to make, modify, and repeal, as public policy or the public need shall demand. Such being the case, the question presents itself whether anything may be made the law of the land, or may become due process of law, which the legislature under proper forms may see fit to enact? To solve this question we have only to consider for a moment the purpose of the clause under examination. That purpose, as is apparent, was individual protection by limitation upon power; and any construction which would leave with the legislature this unbridled authority, as has been well said by an eminent jurist, 'would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense.' The people would be made to say to the two Houses, You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

This Court has heretofore held that it could not shift its responsibilities to protect the liberties of the people. Mr. Justice Roberts in *Schneider* v. *State,* 308 U. S. 147, says:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the im-

portance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where *legislative* abridgment of the rights is asserted, THE COURTS should be astute to examine the effect of the challenged legislation . . . And so, as cases arise, the delicate and difficult task *falls* upon THE COURTS to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

In effect the *Gobitis* decision left the "poor and weak" and helpless minority known as Jehovah's witnesses at the unlimited disposal of public opinion without mercy and the uncontrolled discretion of legislatures and school boards of the nation. Thus unalienable, constitutional fundamental personal rights of helpless minorities were sacrificed to the god of public opinion.

Judge Parker in the case of *Barnette et al.* v. *West Virginia State Board of Education,* 47 F. Supp. 251 (No. 591, October Term 1942, pending on appeal in this Court), answers each ground relied upon by Justice Frankfurter in the *Gobitis* case. Here we refer to the *entire opinion* of Judge Parker in that case, and quote therefrom the following:

"Religious freedom is no less sacred or important to the future of the Republic than freedom of speech, and if speech tending to the overthrow of the government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety. Surely, it cannot be that the nation is endangered more by the refusal of school children, for religious reasons, to salute

> the flag than by the advocacy on the part of grown men of doctrines which tend towards the overthrow of the government."

We do not question the right of the public schools to conduct regularly the flag salute ceremony; but we do question the attempt to compel conscientious objectors guided by the Word of God to salute the flag or participate in the ceremony contrary to specific commandment of Jehovah God. It is perfectly proper and lawful for one NOT BOUND by a covenant with Jehovah to salute the flag of the United States when that person desires to salute it. It is entirely wrong to interfere with that right or prevent such one from saluting the flag. Conversely, it is also true that it is wrong and illegal to *compel* one who, for conscience' sake, cannot participate in the ceremony.

When the conflict arises and the school enters upon the effort to compel the pupil then an entirely different problem is presented. Then the *compulsory* flag-salute regulation must be weighed and appraised against the constitutional right of the pupil and his parents. If the means employed, that is, the *compulsory* flag salute, has no reasonable and direct connection with the ends aimed for, it is the duty of the court to declare the statute unconstitutional when brought into collision with the provisions of the First Amendment. See Freund, *The Police Power,* pp. 133, 497.

Public education for all children, regardless of whether their parents are rich or poor, popular or unpopular, bond or free, black or white, is of far greater importance to the welfare and progress of the nation than is the regimentation of the children at school. Forcing them to express outwardly a sentiment indicated by the flag-salute having no direct relation to the public safety or the welfare of the children is unconstitutional and leads to far more devastating consequences than do open schools for all. It is suggested that if education is to be denied to children *who are disloyal* to the American government, then a more certain and accurate

method is essential to determine whether or not the child is loyal. The flag-salute ceremony is inadequate for such purpose. Since it is only an outward display of loyalty it can be performed by persons who do not *think* of, comprehend or understand its significance or meaning; and, indeed, the ceremony could be participated in by one who is exceedingly *disloyal* to the government, the Constitution and the things for which the flag stands in order to avoid detection and give a hypocritical outward appearance of loyalty and patriotism.

A proper disposition of the question presented with respect to the compulsory flag-salute regulation is well and properly stated by Justice Stone, dissenting in the *Gobitis* case. We adopt and make his entire opinion a part hereof by reference and quote from it here, to wit, "With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

Chief Judge Lehman of the New York Court of Appeals in his concurring opinion in *People* v. *Sandstrom,* 279 N. Y. 523, 18 N. E. 2d 840: "The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience."

In the case of *In re Lefebvre,* 20 A. 2d 185, the children involved had been expelled from school because they refused to salute the flag. The parents were unable to provide satisfactory private schooling for them. They were committed to the reform school because of alleged delinquency. In reversing the Superior Court and Nashua Municipal Court the Supreme Court of New Hampshire said:

"Loving parents who do their best for their children in support, nurture and admonition are of more worth than pecuniary means. Righteous and generous motives may be of more importance than notions that chime with majority opinions of what is good form or what is the best method of teaching patriotism. It would be one thing to say that the legislature intended to permit school authorities to prescribe ceremonial forms for such teaching and to exclude from public school privileges those children who decline, from whatever motive, to conform. But in view of the sacredness in which the State has always held freedom of religious conscience, it is impossible for us to attribute to the legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious . . . scruples not shared by the majority of the community, at least provided those scruples are exercised in good faith, and their exercise is not tinged with immorality or marked by damage to the rights of others."

The parent cannot be prosecuted for refusal and failure to send his children to a public school where such is compulsory by law when the parent seeks to have the child attend a private religious school giving religious instruction not provided in the public school. *Pierce* v. *Society of Sisters,* 268 U. S. 510. In *People* v. *Stanley,* 81 Colo. 76, 265 P. 610, it was held that the parent has a constitutional right to direct the children's studies at school; and cannot be made to surrender the right so to direct in consideration of obtaining the benefit of public education. *Terral* v. *Burke Construction Co.,* 257 U. S. 529. This Court has held unconstitutional a statute which makes it unlawful to teach the German language in public schools. *Meyer* v. *Nebraska,* 262 U. S. 390. See also *Farrington* v. *Tokushige,* 273 U. S. 284; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; *Berea College* v. *Kentucky,* 211 U. S. 45, 67; *State ex rel. Finger* v. *Weedman,* 55 S. Dak. 343, 226 N. W. 348; *Reynolds* v. *Rayborn,* 116 S. W. 2d 836 (Tex. Civ. App.); *In re Jones,* 24 N. Y. S. 2d 10, 175 Misc.

451; *State of Kansas* v. *Smith and Griggsby,* 127 P. 2d 518; *In re Latrecchia,* 128 N. J. L. 472, 26 A. 2d 881; *In re Reed,* 28 N. Y. S. 2d 92; 262 A. D. 814. All these cases are directly in point here and conflict with the holding of the court below.

This Court very correctly and boldly held that one who daily conducted a flag-salute ceremony at a school camp through which homage was paid to the Communist Russian flag could not be convicted under a statute designed to curtail such conduct on the grounds that it would abridge the teacher's right of free speech. See *Stromberg* v. *California,* 283 U. S. 359. By analogy the same principle would allow Jehovah's witnesses the right to refuse to salute the Nazi, Communistic, or American emblems and all other *man-made* flags of earthly governments.

The compulsory expression of a sentiment by giving a hypocritical flag salute is identical to the *test oaths* uniformly held unconstitutional by this court. See *Ex parte Garland,* 4 Wall. 333, and *Cummings* v. *Missouri,* 4 Wall. 277, 323. In *Kennedy* v. *Moscow,* 39 F. Supp. 26, and *Reid* v. *Brookville,* 39 F. Supp. 30, the requirement that one salute the American flag and give the pledge of allegiance as conditions precedent to exercise of constitutional rights was declared to be unconstitutional. All these cases conflict with the holding of the court below.

The fact that this case is before the Court presenting again the *same issue* as that presented in the *Gobitis* case together with the bloody record of persecution of Jehovah's witnesses since that decision because of the flag question and the consistent refusal of state courts to follow this Court's decision in that case, to say nothing of the defiant refusal of the United States District Court of West Virginia to follow blindly the 'impaired' *Gobitis* decision, is and should be sufficient proof that the question is really *undetermined* and should be thoroughly reconsidered and redecided. The entire issue should be re-argued so as to give the new justices an opportunity to express themselves on the question and to afford the ones who joined in the

majority opinion an opportunity to reconsider their conclusions.

A reconsideration is necessary in order to avoid nation-wide chaos as to the rights and duties of parents and children. The present trouble throughout the nation on the question is doing much to impair national unity and cohesion because of the failure of this court to announce the accommodation the Constitution provides to minorities like petitioner and his children. This situation recalls to mind the Dred Scott case (*Scott* v. *Sandford,* 1856, 19 How. 393). Here, however, the question need not be settled by a new constitutional amendment, as in the negro slave controversy, although the *Gobitis* decision suggests popular appeal. This question has been settled long prior to the *Gobitis* decision by the adoption of the 1st and 14th Amendments, therefore this Court should grant the petition for writ of certiorari.

CONCLUSION

It is submitted that this case is one calling for exercise by this Court of its supervisory powers under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] and Rule 38, paragraph 5 (a), of the Rules of this Court. To that end this petition for writ of certiorari should be granted so as to correct the assigned errors committed by, and the judgment rendered by the Superior Court of Maricopa County against petitioner, which judgment should be reversed.

Respectfully submitted,

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